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IN THE

Supreme Court of the United States

IN RE AGENT ORANGE PRODUCT LIABILITY LITIGATION:

DOW CHEMICAL COMPANY, MONSANTO COMPANY, ET AL.,

Petitioners,

v.

DANIEL RAYMOND STEPHENSON, ET AL.,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether absent class members are precluded from relitigating the issue of adequacy of representation through a collateral attack on a class settlement, after class members had a full opportunity to opt out, object, and appeal, and after both the trial court and the court of appeals, in the course of approving the settlement, expressly determined that the class representatives adequately represented the entire class.

2. Whether, if collateral attack is permissible, the "adequacy of representation" issue is properly determined as of the time of the original litigation or in light of events and changes in the law occurring years after the settlement has become final and all of the settlement proceeds have been disbursed.

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BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the Product Liability Advisory Council as *amicus curiae* in support of petitioners.[1]

INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit association with 129 corporate members representing a broad cross-section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States

[1] Consent from counsel for petitioners and respondents has been filed with the Clerk of this Court. No counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC. Since 1983 PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. A list of PLAC's corporate members is attached as Appendix A. As frequent participants in, and observers of, class action settlements and litigation, PLAC's members have a real and concrete interest in the resolution of the questions presented in this case.

SUMMARY OF ARGUMENT

This case presents a question of profound importance in the class action arena: Is a class action judgment or settlement *ever* final? The Second Circuit answered "no" by dramatically reopening the Agent Orange global settlement agreement, long thought a closed chapter of American legal history. In the process, the court created a novel rule of law that affords absent class members a broad – and potentially boundless – right to bring a collateral attack to a class action judgment or settlement on the ground that the class representative did not adequately represent the class.

If upheld, the Second Circuit's ruling could, at least in principle, threaten to upset the finality of *every* class action settlement or judgment ever reached. And by radically destabilizing settled class action determinations, the court's rule would render the class action device a precarious (and thus highly undesirable) method for resolving disputes. It would, in effect, place a question mark after every "It is so ordered" entered on the Nation's class action docket. Yet it

is precisely in the class action context that finality, repose, and voluntary settlements of disputes are perhaps most highly valued and urgently needed. In other words, the Second Circuit's decision erects a special class action collateral attack rule that will inevitably – and quite perversely – thwart the primary objectives of the class action device. Indeed, it is difficult to imagine a rule of law that would more seriously undermine the core utility and rationale of class actions.

No constitutional or statutory provision requires such a rule, no precedent of this Court supports it, and no sensible policy objective would be furthered by its adoption. The Court should therefore reverse the decision below and make clear that a collateral attack of a class action judgment or settlement on adequacy of representation grounds must be limited to minimal review of the fairness of the procedures employed by the certifying court. *See Epstein v. MCA, Inc.*, 179 F.3d 641 (9th Cir. 1999).

ARGUMENT

In principle, the rule of law that the Second Circuit announced could permit dissatisfied class members to wage collateral attacks on any and all class action decisions – whether reached in state or federal court, and whether reached last week, last decade, or perhaps even a quarter-century ago. The only requirement is that the plaintiff mounting the collateral attack assert, on the basis of subsequent developments or new legal standards not applicable at the time the class originally was certified, that his or her particular interests were not adequately represented. And the only discernible protection for class action defendants would be the purely accidental fact that, in some cases, there may be no class members who wish to bring such an attack.

Yet, a central feature of the modern class action device is that a class action determination reached after compliance with class action procedures precludes the claims of *all* class

members. As demonstrated below, the broad collateral attack rule adopted by the Second Circuit below is flatly inconsistent with that core class action objective, as well as its related objectives of avoiding duplicative litigation and fostering voluntary settlements. In order to prevent collateral review from undermining the utility, and basic fairness, of the class action device, such review must be extremely limited. It should not extend beyond a review of the fairness of the procedures employed by the certifying court. Because modern class action procedural rules ensure fundamental fairness to the class, conscientious application of those rules by the certifying court should be a sufficient ground for rejecting most, if not all, collateral attacks brought on adequacy of representation grounds.

I. A BROAD RIGHT TO RELITIGATE ADEQUACY OF CLASS REPRESENTATION WOULD THREATEN THE FINALITY OF COUNTLESS CLASS ACTION DECISIONS, UNDERMINING CORE CLASS ACTION PURPOSES.

The Second Circuit's broad collateral attack rule threatens the finality of all class action determinations reached to date, as well as the finality of all pending and future class proceedings. Without some secure promise of finality, class actions will lose much – if not all – of their utility as a dispute resolution mechanism. No matter how diligently the litigants or the court attempt to craft a fair resolution of a class conflict – including sustained efforts to ensure the adequate representation of absent class members – substantial doubts as to the binding effect of any determination would remain. There would always be a risk – as demonstrated in this very case – that some absent class member might emerge years later to announce his discontent for the first

time.[2] Whenever such an attack is made, the Second Circuit's rule authorizes plenary, *de novo* reconsideration of the initial court's adequacy of representation determination. Pet. App. 16a-20a.

Such a broad collateral attack rule is plainly inconsistent with the judiciary's obligation to secure the finality of legal judgments. *See, e.g., Southern Pac. R. Co. v. United States*, 168 U.S. 1, 49 (1897) (Harlan, J.) ("Th[e] general rule [of *res judicata*] is demanded by the *very object for which civil courts have been established*, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination") (emphasis added); *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (preclusion doctrines "relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication"). That obligation serves fundamental principles of societal justice,[3] and must take precedence *even* over claims that equity or unforeseen circumstances suggest a different result in a particular case. *See Federated Dep't Stores, Inc. v. Moitie*, 452 U.S.

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[2] *See* Geoffrey P. Miller, *Full Faith and Credit to Settlements in Overlapping Class Actions: A Reply to Professors Kahan & Silberman*, 73 N.Y.U. L. Rev. 1167, 1169 (1998) ("All class action settlements, however generous to the class, however competently litigated, and however much the product of adversarial, arm's-length negotiations between the parties, would be open to collateral attack in a subsequent forum. There is nothing the parties in the first forum can do to prevent this danger.").

[3] *See, e.g., Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981) (*res judicata* is a rule of "'fundamental and substantial justice'" and a rule "'of public policy and of private peace'" (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)); *Reed v. Allen*, 286 U.S. 191, 198-99 (1932) (doctrine of *res judicata* was "conceived in the light of the maxim that the interest of the state requires that there be an end to litigation – a maxim which comports with common sense as well as public policy").

394, 401 (1981) ("The doctrine of *res judicata* serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case."); *Reed v. Allen*, 286 U.S. 191, 199 (1932) ("mischief which would follow the establishment of a precedent for . . . disregarding this salutary doctrine against prolonging strife *would be greater than* the benefit which would result from relieving some case of individual hardship") (emphasis added).

The Second Circuit claimed that its collateral attack rule was not a challenge to finality *per se*, but simply a means of determining whether the conditions justifying finality exist. *See* Pet. App. 16a ("Plaintiffs do not attack the merits or finality of the settlement itself, but instead argue that they were not parties to that judgment. If plaintiffs were not proper parties to that judgment, . . . *res judicata* cannot defeat their claims."). But this argument overlooks what is perhaps the core purpose of the modern class action: namely, affording preclusive effect of a class action determination to the claims of *all* class members. *See* 18A Charles Alan Wright *et al.*, FEDERAL PRACTICE AND PROCEDURE § 4455, at 448 (2d ed. 2002) ("The *central purpose* of each of the various forms of class action is to establish a judgment that will bind not only the representative parties but all nonparticipating members of the class certified by the court. . . . The efficient, consistent, and fair determination of indistinguishable claims is a paramount goal. That goal *requires preclusion*.") (emphasis added); *Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) ("There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly entertained class action is binding on class members in any subsequent litigation.").[4]

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[4] *See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985) (recognizing obvious and immediate injury to defendant caused by permitting class action judgment to become final "without binding the plaintiff class"); *Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 367 (1921) ("If the [class action] decree is to be effective and conflicting judgments are to be avoided, all of the class must be concluded by the decree."); *Jamerson v. Lennox*, 356 F. Supp. 1164, 1169 (E.D. Pa. 1973) (fact that prior litigation was a class action "weighs in favor of, not against, applying *res judicata*; an obvious purpose of permitting class action is to bind the members of the class").

In other words, plenary collateral review is not necessary, as the Second Circuit supposed, to create the circumstances justifying finality. Those circumstances are present by virtue of compliance with Rule 23 itself.[5] *See* Fed. R. Civ. P. 23(c)(3) ("The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, *shall include* and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.") (emphasis added). Rule 23 creates, in effect, a presumption in favor of classwide preclusion: where the requirements of the rule are met, classwide preclusion is justified as to all persons who remain class members at the time judgment is entered. *See* 7B Wright *et al.*, *supra*, § 1789, at 244 ("The obvious implication of Rule 23(c)(3) is that anyone properly listed in the judgment should be bound by it *absent some special reason for not doing so*.") (emphasis added); 7A Wright *et al.*, *supra*, § 1765, at 264 ("[A]ll absent class members in Rule 23(b)(3) actions . . . *usually will be bound* by the determination in the suit . . . .") (emphasis added).

Indeed, one of the main goals of the 1966 amendments to Rule 23 was to buttress this central objective of classwide preclusion. The original 1937 rule contained no provision analogous to Rule 23(c)(3), and thus generated considerable uncertainty as to what circumstances would justify classwide

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[5] The same conclusion would apply, of course, as to collateral review of adequacy determinations made under the many state class action procedural rules modeled on Fed. R. Civ. P. 23.

preclusion. *See* Fed. R. Civ. P. 23 advisory committee's note (explaining that original class action rule failed to "squarely address itself to the question of the measures that might be taken during the course of the action to assure procedural fairness, particularly giving notice to members of the class, which may in turn be related in some instances to the extension of the judgment to the class").[6] The drafters of the 1966 amendments to Rule 23 purposely sought to rectify these deficiencies by providing that "all class actions maintained to the end as such will result in judgments including those whom the court finds to be members of the class, whether or not the judgment is favorable to the class." *Id.* The new rule also outlined, with the express aim of ensuring the preclusive effects of class action judgments to the greatest extent possible, the procedural "measures which can be taken to assure

[6] Preclusion under the original rule was further complicated by the concept of "spurious" class actions – *i.e.*, actions, such as this case, involving "'several' rights affected by a common question and related to common relief"— to which courts gave no preclusive effect at all. *Id.* Absent class members could be affected by a "spurious" class action judgment only insofar as those members wished to obtain the benefits of a favorable judgment in a disfavored procedure aptly termed "one-way intervention." *See id.* (noting that courts in "spurious" class actions had "held or intimated that class members might be permitted to intervene after a decision on the merits favorable to their interests, in order to secure the benefits of the decision for themselves, although they would presumably be unaffected by an unfavorable decision."). These preclusion rules came to be seen as unsatisfactory – not only because courts found it exceedingly difficult to distinguish between "spurious" class actions and other categories of class actions that were afforded greater preclusive effect (so-called "true" or "hybrid" class actions), but more importantly because the rationale for denying preclusive effect to "spurious" class actions undercut the central objectives of the class action device. *See id.* ("The 'spurious' action envisaged by original Rule 23 was in any event an anomaly because, although denominated a 'class' action and pleaded as such, it was supposed not to adjudicate the rights or liabilities of any person not a party.").

the fair conduct of [class] actions." *Id.*[7]

The Second Circuit's adoption of a broad collateral attack rule effectively vitiates the 1966 amendments to Rule 23. By requiring collateral proceedings to establish the conditions for preclusion, its rule thwarts amended Rule 23's core objective of establishing *at the time of judgment* the justification for classwide preclusion. *See* Linda Silberman, *The Vicissitudes of the American Class Action—With A Comparative Eye*, 7 Tul. J. Int'l & Comp. L. 201, 214 (1999) (collateral attacks on adequacy determinations "represent[] serious danger to the finality that is the essence of class litigation and settlements"); Note, *Collateral Attack on the Binding Effect Of Class Judgments*, 87 Harv. L. Rev. 589, 605 (1974) ("An unlimited and ill-defined scope of collateral review threatens the finality of class action judgments and the usefulness of the class action device, reversing a century-long trend in the development of the class action rule.").

In addition, the Second Circuit's novel rule would revive, in a somewhat different form, the problem of "one way" preclusion, *see supra* note 6, by permitting absent class members to sit back and await a class action judgment or settlement before deciding whether or not to be "bound" by that determination. *See* Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 Sup. Ct. Rev. 219, 268 (1996) [Kahan & Silberman I] (noting that

[7] *See also In re General Motors Corp. Pick-Up Truck Prod. Liab. Litig.*, 55. F.3d 768, 785 (3d Cir. 1995) (procedural requirements of Rule 23 were designed "so that the court can assure, to the greatest extent possible, that the actions are prosecuted on behalf of the actual class members in a way that makes it fair to bind their interests."). The amended rule also facilitated classwide preclusion by eliminating the traditional categorization of "true," "hybrid," and "spurious" class actions, and by abolishing the concept of one-way intervention. *See* Fed. R. Civ. P. 23 advisory committee's note.

liberal collateral attack rule creates a "post-settlement opt-out" right); Note, *supra*, at 602 (observing that broad collateral attack rule creates "'a return to one-way intervention under a new guise,'" and that defendants might be "placed in the position of having gone through complex and expensive class action litigation only to be forced to relitigate the entire controversy again against parties that would have participated in the judgment if it had been favorable to them.") (quoting *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452, 459 (E.D. Pa. 1968)). Yet one of the primary insights of the 1966 amendments is that the class action device can be effective *only* if the judgment conclusively resolves the claims of *all* class members, *regardless* whether the judgment or settlement is favorable to the class.

The Second Circuit's broad collateral attack rule is also directly inconsistent with the class action objective of avoiding duplicative litigation of the same basic issues. A class cannot be certified, and thus cannot proceed to judgment, or settlement, *see Amchem Products v. Windsor*, 521 U.S. 591, 620-21 (1997), unless the certifying court determines that the class representatives are adequate. Fed. R. Civ. P. 23(a)(4). A broad collateral attack rule, by authorizing a second, *de novo* determination of the adequacy of representation issue, promises at least two bites at the apple on the identical legal issue, thus replicating the very inefficiencies that the class action mechanism was designed to avoid. *See* Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of* Epstein v. MCA, Inc., 73 N.Y.U. L. Rev. 765, 779 (1998) [Kahan & Silberman II] ("From the perspective of efficiency . . . multiple determinations of the same issue undermine the very efficiencies sought to be achieved by the class action mechanism"); William T. Allen, *Finality of Judgments in Class Actions: A Comment on* Epstein v. MCA, 73 N.Y.U. L. Rev. 1149, 1159-60 (1998) (collateral attacks "reinvent[] the problem of inefficiency and second guessing that is solved by the rule of

finality and recognition of judgments").[8]

Finally, and for similar reasons, a broad collateral attack rule will seriously interfere with litigants' incentive to settle class action disputes. Many courts have recognized that the general public policy favoring voluntary settlements is paramount in the class action context because of the administrative burdens that complex class litigation imposes on the courts. *See, e.g., Bano v. Union Carbide Corp.*, 273 F.3d 120, 129 (2d Cir. 2001) ("public interest in amicable resolution of cases is particularly strong in the context of mass tort and similar litigation").[9] Yet despite the pressing nature of this concern in the class action context, the Second Circuit's collateral attack rule makes voluntary settlement of class actions uniquely difficult to achieve. Why would any rational defendant agree to settle if it cannot achieve peace and repose with respect to the entire class? At the very least, the risk that a class settlement might be disturbed, years later, by a now-silent class member will substantially discourage defendants from entering into any class settlement. *See* Kahan & Silberman II, *supra*, at 779 & n.66 (possibility of one successful collateral attack, however weak its merits, creates "potential for double liability [that] will increase the ex-

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[8] In fact, the number of collateral attacks is limited only by the number of dissatisfied class members who ultimately choose to wage such attacks. *See* Kahan & Silberman II, *supra*, at 784 ("[T]here may well be several bites at the apple. If the collateral attack on behalf of a second class member in another forum fails, another collateral attack on behalf of a second class member in another forum is available, and if that fails, a third; and so on.").

[9] *See also In re The Exxon Valdez*, 229 F.3d 790, 795 (9th Cir. 2000) ("general policy of federal courts to promote settlement before trial is even stronger in the context of large-scale class actions"), *cert. denied*, 533 U.S. 903 (2001); *In re Gen. Motors Corp. Pick-Up Truck.*, 55 F.3d at 805 (noting "urgency of [public] policy [favoring settlements] in complex actions that consume substantial judicial resources and present unusually large risks for the litigants").

pected liability of defendants and severely impede the ability to settle a class to start with"); Note, *supra*, at 600 (same).

For all of these reasons, it is clear that the Second Circuit's seemingly boundless collateral attack rule directly interferes with the main objectives of the modern class action device. In order to prevent that result, collateral attacks on adequacy of representation grounds must be narrowly circumscribed. If the class receives proper notice of the proceeding, and the court provides a full and fair opportunity for class members to raise objections to the adequacy of the class representation, the certifying court's adequacy of representation determination should be final and conclusive with respect to all class members. As a general rule, class members wishing to raise adequacy objections must do so before the certifying court, and, if necessary, before appellate courts on direct review. *See Epstein*, 179 F.3d at 648.

Proponents of a broad collateral attack rule have argued that any other approach would effectively require absent class members to intervene before the certifying court to raise objections to the adequacy of the class representation, and that "attribution of preclusive effect to a failure to intervene" is inconsistent with the federal rules of civil procedure, which impose no such mandatory intervention in these circumstances. *Martin v. Wilks*, 490 U.S. 755, 765 (1989); *see* Patrick Woolley, *The Availability of Collateral Attack For Inadequate Representation in Class Suits*, 79 Tex. L. Rev. 383, 402-04 (2000). But the Court in *Martin* merely held that attribution of preclusive effect to a failure to intervene would be inconsistent with the procedural rules governing intervention – Rules 19 and 24. *See Martin*, 490 U.S. at 765. Rule 23, however, is critically different in that, as discussed above, "[t]he whole point of the class action procedure – and what distinguishes it from permissive intervention – is its basic premise that a judgment does have binding effect on absent class members who are designated as such

through the class action certification procedure of Rule 23 or its state counterparts." Marcel Kahan & Linda Silberman, *The Proper Role for Collateral Attack in Class Actions: A Reply to Allen, Miller, and Morrison*, 73 N.Y.U. L. Rev. 1193, 1202 (1998) [Kahan & Silberman III].[10]

A related argument offered in favor of the Second Circuit's rule rests on this Court's statement in *Shutts* that "an absent class-action plaintiff is not required to do anything" and is "not required to fend for himself." *Shutts*, 472 U.S. at 809-10; *see Epstein v. MCA, Inc.*, 126 F.3d 1235, 1245 (9th Cir. 1997), *rev'd*, 179 F.3d 641 (9th Cir. 1999). But it is plainly a misreading of *Shutts* to interpret these words – which were written to support the conclusion that the "minimum contacts" personal jurisdiction requirement did not apply to class action plaintiffs – as a holding that absent class members cannot be obliged to present their adequacy objections to the certifying court. Moreover, to the extent *Shutts* sheds light on the question before the Court in this case, its recognition of absent class members' ability to remain passive during the class proceeding actually undermines the need for a broad collateral attack rule. That is because, as the Court noted, the absent class members are justified in relying upon the certifying court, and the defendant opposing class certification, to protect their interests. *See Shutts*, 472 U.S. at 809; *see also Epstein*, 179 F.3d at 648; *infra* at 28.

In sum, the broad collateral attack rule endorsed by the Second Circuit is flatly inconsistent with core objectives of the class action device, including conclusive and final class-

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[10] In any event, the premise of this objection – that mandatory intervention necessarily follows from rejection of a broad collateral attack rule – is simply mistaken. It is well established that absent class members may raise objections before the certifying court by way of "appearance." *See* Fed. R. Civ. P. 23(c)(2). And as this Court recently held, formal intervention is not a prerequisite to an absent class member's ability to bring a direct appeal. *See Devlin v. Scardelletti*, 536 U.S. 1 (2002).

wide preclusion, avoidance of duplicative litigation, and facilitation of voluntary settlements. If upheld, the ruling below threatens to undermine the very utility of the class action device, and to create tremendous legal uncertainty in an area of the law in which finality and repose are perhaps most necessary. Given the numerous adverse consequences implicit in a broad collateral attack rule, such a rule could be justified only if there were truly compelling reasons mandating its adoption. As demonstrated below, no such reason exists.

II. THERE IS NO AUTHORITY OR JUSTIFICATION FOR ALLOWING BROAD COLLATERAL ATTACK.

Proponents of a broad collateral attack rule largely ignore the fundamental inconsistencies between such a rule and the core objectives of the class action device. Instead, proponents rely on several arguments that, in their view, *compel* adoption of such a rule. Thus, it is argued that (1) basic principles of *res judicata* mandate a "right" to bring a broad collateral attack to the substance of the initial court's adequacy of representation determination; (2) the Due Process Clause mandates such a right; and (3) a broad right of collateral attack is necessary in order to provide adequate protection for the absent class members. As demonstrated below, none of these arguments has merit. At the end of the day, there is no authority or justification for adopting a rule that creates such intractable impediments to efficient class action practice and procedure.

A. Basic Principles of *Res Judicata* Do Not Require – Or Even Support – A Broad Collateral Attack Rule.

As noted, proponents of a broad collateral attack rule argue that such a rule is mandated by basic principles of *res judicata*. One of those basic principles is that a court "cannot predetermine the *res judicata* effect of [its own] judgment," which "can be tested only in a subsequent action." Fed. R. Civ. P. 23 advisory committee's note (citing RESTATEMENT OF JUDGMENTS § 86 cmt h; § 116 (1942)); 7B Wright *et al.*, § 1789, at 245; *see also Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 396 (1996) (Ginsburg, J., concurring in part and dissenting in part) (same); *Shutts*, 472 U.S. at 805; Pet. App. 14a (relying on *Shutts*). Because adequacy of representation is a prerequisite to class action preclusion, *see Hansberry v. Lee*, 311 U.S. 32, 42 (1940), this argument goes, there must be a right to bring a collateral attack on the ground that the representation was, in fact, inadequate. Thus, in the Second Circuit's words, respondents' "collateral attack, which seeks only to prevent the prior settlement from operating as *res judicata* to their claims, is permissible." Pet. App. 13a. Having decided that the attack was permissible, the court below went on to decide *for itself* whether the class representatives adequately represented the absent class members in the original proceeding. *See id.* at 16a-20a.

The Second Circuit appears to have concluded that a "permissible" collateral attack entails plenary, *de novo* review of the substance of the initial court's adequacy determination. But that conclusion simply does not follow from the principle that a court may not predetermine the *res judicata* effect of its own judgment – which may well support some form of "testing" by a collateral court. *See* Note, *supra*, at 594 (distinguishing between right to bring collateral attack, and "nature and scope of review to be applied" in collateral attack). In fact, plenary, substantive review of prior determinations is but one, exceedingly rare and highly controversial, form of collateral review. *See, e.g., Brown v. Allen*, 344 U.S. 443, 458 (1953) (federal courts may exercise independent judgment of constitutional claims on collateral, habeas corpus review of state court judgments). It is in no way a necessary component of collateral review, let alone its most prevalent form. *See Williams v. Taylor*, 529 U.S. 362,

411 (2000) (interpreting 28 U.S.C. § 2254, which substantially narrowed the scope of habeas review, and permits issuance of the writ only where state court application of federal law is "unreasonable");[11] *see also Martin*, 490 U.S. at 771-72 & n.6 (Stevens, J., dissenting) ("In both civil and criminal cases, . . . the grounds that may be invoked to support a collateral attack are much more limited than those that may be asserted as error on direct appeal.").

Consideration of the way in which courts treat collateral attacks brought on jurisdictional grounds reinforces the point that plenary reconsideration of previously decided issues on collateral attack is exceedingly rare. A party ordinarily may

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[11] *See also Wright v. West*, 505 U.S. 277, 285 (1992) (noting that, prior to 1953, scope of federal habeas review was limited to inquiry whether defendant had a full and fair opportunity to litigate claims in state court); *Bousley v. United States*, 523 U.S. 614, 621 (1998) (circumstances under which guilty plea may be attacked on collateral review of federal conviction are "strictly limited"; habeas review is an "extraordinary remedy and will not be allowed to do service for an appeal") (citation and internal quotation marks omitted); *Hill v. United States*, 368 U.S. 424, 428 (1962) (habeas relief under § 2255 available only for "fundamental defect which inherently results in a complete miscarriage of justice"); *Reed v. Farley*, 512 U.S. 339, 353-54 (1994) (applying *Hill*'s "fundamental defect" standard to habeas review of state conviction based on non-constitutional, statutory grounds); *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993) ("The principle that collateral review is different from direct review resounds throughout our habeas jurisprudence.").

This Court's consistent limitation of the writ of habeas corpus is instructive not only because it demonstrates that full relitigation is not integral to the concept of collateral review, but because it severely undercuts any claims by absent class members in civil cases that a limited right of collateral attack would be fundamentally unfair. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 Sup. Ct. Rev. 337, 373 (1999) ("[I]t would be ironic if the restrictive development of recent habeas jurisprudence were to leave capital penalty defendants with highly constricted nonappeal routes of challenge, but would afford that same opportunity to absent class action plaintiffs.").

bring a collateral attack to a prior judgment on the ground that the first court lacked personal jurisdiction over him. But a collateral attack on personal jurisdictional grounds – which is as much a component of Due Process as is the requirement of adequate representation, *Hansberry*, 311 U.S. at 40-41 – is completely foreclosed if the issue of personal jurisdiction was actually resolved in the first action. *See Baldwin v. Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 524-26 (1931); James Wm. Moore *et al.*, MOORE'S FEDERAL PRACTICE § 131.30[2][a], at 131-94 (3d ed. 2002). Likewise, although a court without subject matter jurisdiction has no power to decide the case before it, a final judgment rendered by such a court is conclusive, and generally immune from collateral attack on the grounds that jurisdiction was lacking. *See Underwriters Nat'l Assurance Co. v. North Carolina Life & Accident & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706-07 & n.13 (1982) ("This Court has long recognized that '[t]he principles of *res judicata* apply to questions of jurisdiction as well as to other issues.'") (quoting *American Surety Co. v. Baldwin*, 287 U.S. 156, 166 (1932)). Indeed, the rule that subject matter jurisdiction generally may not be challenged on collateral attack applies even where the initial court's jurisdictional determination is implicit. *See Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 377 (1940); *Stoll v. Gottlieb*, 305 U.S. 165, 171-72 (1938) ("Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter.").[12]

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[12] To be sure, exceptions to this general rule exist. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 12 (1982) (collateral attack challenging subject matter jurisdiction permissible only on the ground that subject matter of the action was "so plainly beyond the court's jurisdiction that its entertaining the action was a manifest abuse of authority," permitting the judgment to stand would substantially infringe another tribunal's authority, or where original court lacked the capability to make an informed judgment and "procedural fairness" favors such an attack). But those

The subject matter jurisdiction example is particularly instructive because it rests on the concept that a court has "jurisdiction to determine jurisdiction" – that is, a court has the authority to resolve finally and conclusively a question (its very power to decide) that is a prerequisite to preclusion. *See Chicot County Drainage Dist.*, 308 U.S. at 376 (courts of limited jurisdiction nonetheless have authority "to determine whether or not they have jurisdiction" and "[t]heir determinations of such questions, while open to direct review, may not be assailed collaterally"); *Page v. Schweiker*, 786 F.2d 150, 154 (3d Cir. 1986). In similar fashion, class action procedure mandates a full consideration of the adequacy of representation issue before the first judgment properly can be reached. Fed. R. Civ. P. 23(a)(4); *Amchem*, 521 U.S. at 620-21. In other words, class action procedure treats adequate representation as a kind of jurisdictional prerequisite to hearing the case *as a class action*. Once decided, that determination, like a determination as to subject matter jurisdiction, generally should be immune from collateral reexamination.[13]

In sum, the principle that a party has a "right" to test the preclusive force of a prior judgment provides no basis whatsoever for holding that collateral review must be of the plenary kind envisaged by the Second Circuit, as opposed to the

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exceptions simply underscore the point that plenary reconsideration of previously litigated issues is generally unavailable.

[13] Of course, application of the "jurisdiction to determine jurisdiction" concept ordinarily presupposes the actual presence of the party to be bound in the initial proceeding, *see Chicot County Drainage Dist.*, 308 U.S. at 376 – an element obviously lacking when applied to absent class members who make no appearance before the certifying court. But the supposed requirement of actual participation by absent class members in order to justify preclusion is very much the heart of the question before this Court. The point here is simply this: the notion that *res judicata* principles require all prerequisites to preclusion to be *independently examined* by the collateral court is flatly wrong.

Ninth Circuit's far more limited rule that collateral review of adequacy of representation issues is appropriate only to review the adequacy of procedures before the certifying court. *Epstein*, 179 F.3d at 648-49. To the extent settled *res judicata* principles speak to the question of the appropriate scope of collateral review at all, those principles indicate, as discussed above, that full reconsideration of an issue actually resolved in the first proceeding is the exception rather than the rule.

B. The Due Process Clause Only Requires Procedures That "Fairly Insure" Adequate Representation Of The Absent Class Members' Interests.

Since the justification for a broad collateral rule cannot be located in general *res judicata* principles, proponents of such a rule argue that the Due Process Clause mandates plenary consideration of the certifying court's adequacy of representation determination. The principal authority for this argument is said to be *Hansberry v. Lee*, 311 U.S. 32 (1940), in which this Court held that the Due Process Clause requires some form of adequate representation to support classwide preclusion. *See id.* at 41. If *Hansberry* is read to require adequate representation *in fact* as an element of Due Process, a collateral court could not give preclusive effect to a judgment rendered in violation of that requirement. *See Richards v. Jefferson County*, 517 U.S. 793, 797 n.4 (1996). In that event, the Due Process limitation on general preclusion principles might require the collateral court to reach an independent judgment as to the adequacy of representation in the initial proceeding. *See* 7B Wright *et al.*, *supra*, § 1789, at 249-50 ("The key to obtaining the fullest possible binding effect for a class action judgment . . . depends on determining what elements are necessary to satisfy due process.").

The fatal flaw in this argument is its premise that *Hansberry* interpreted the Due Process Clause to guarantee ade-

quate representation in fact. In defining the circumstances in which inadequate representation would violate Due Process, the Court stated that "there has been a failure of due process *only* in those cases where it cannot be said that the procedure adopted, *fairly insures* the protection of the interests of absent parties who are to be bound by it." *Hansberry*, 311 U.S. at 42 (emphasis added); *see id.* at 43 (noting potential constitutionality of "procedure whereby some of the members of the class could stand in judgment for all, provided that the procedure were so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue");[14] *Richards*, 517 U.S. at 802 (finding adequacy of representation lacking where there was no evidence that the initial court "*took care to protect* the interests [of the absent parties] in the manner suggested in *Hansberry*") (emphasis added); *Epstein*, 179 F.3d at 648 ("Due process requires that an absent class member's right to adequate representation be protected by the adoption of the appropriate procedures by the certifying court and by the courts that review its determinations; due process does not require collateral second-guessing of those determinations and that review").[15]

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[14] It is true that the Court in *Hansberry* also stated that "[i]t is *familiar doctrine of the federal courts* that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present, or where they actually participate in the conduct of the litigation in which members of the class are present as parties." *Hansberry*, 311 U.S. at 42-43 (emphasis added); *Epstein*, 126 F.3d at 1245 (relying on this passage to support broad collateral attack rule), *rev'd* 179 F.3d 641 (9th Cir. 1999). But that very quotation is limited to the judge-made doctrine of preclusion – not the requirements of the Due Process Clause – and thus cannot be read to support the conclusion that Due Process requires adequate representation in fact.

[15] *See also Grimes v. Vitalink Communications Corp.*, 17 F.3d 1553, 1558 (3d Cir. 1994) (opportunity to be heard and direct appeal provided "all the process that was due" to bind the entire class); *Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 33 (1st Cir. 1991) (classwide preclusion warranted where "acceptable procedural safeguards have been employed"); *cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 481 (1982) (minimal due process requirement entitling judgment to full faith and credit is violated only where "'there is reason to doubt the quality, extensiveness, or fairness of *procedures* followed in prior litigation'") (quoting *Montana v. United States*, 440 U.S. 147, 164 n. 11 (1979)) (emphasis added).

Indeed, *Hansberry*'s Due Process holding cannot sensibly be read otherwise. The initial state court proceeding in *Hansberry* was not a formal class action proceeding at all. The trial court did not formally designate the case as a class proceeding, made no express findings that the purported class representatives were adequate representatives, and did not give absent class members notice or an opportunity to be heard in the initial proceeding. *See Hansberry*, 311 U.S. at 38-39. Thus, *Hansberry*, at most, requires broad collateral review of the adequacy of representation issue where no prior determination had been made on that issue, and where the absent class members were denied a full and fair opportunity to participate in the proceedings. The decision does not mandate such review where, as here, the certifying court scrupulously adheres to Rule 23's procedural protections, takes measures to protect the absent class members' interests, and expressly resolves the adequacy of representation issue after affording absent members an opportunity to participate. *See* Kahan & Silberman I, *supra*, at 266-67.[16]

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[16] For similar reasons, this Court's statement in *Shutts* that "the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members," *Shutts*, 472 U.S. at 812, cannot be read to resolve the precise question before the Court here. *See Epstein*, 179 F.3d at 648 ("[N]owhere in *Shutts* did the Court state or imply that where the certifying court makes a determination of the adequacy of representation in accord with *Shutts*, this determination is subject to collateral review.").

This procedural interpretation of the adequacy of representation requirement is consistent with this Court's flexible, pragmatic approach to explicating the requirements of the Due Process Clause. *See generally Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (noting that due process "unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances," and that it is "flexible and calls for such procedural protections as the particular situation demands") (citations and internal quotation marks omitted). Thus, the Due Process notice requirement – a requirement, like adequacy of representation, necessary to support classwide preclusion – is not violated whenever notice fails to reach its intended recipient. On the contrary, Due Process requires notice "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also* Fed. R. Civ. P. 23(c)(2) (requiring "best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort"). Because the Due Process Clause does not require that each absent class member actually *receive* notice, a collateral attack seeking to reopen a class determination on that ground, despite the provision of the best practicable notice under the circumstances, necessarily would fail. *See Peters v. National R.R. Passenger Corp.*, 966 F.2d 1483, 1486-87 (D.C. Cir. 1992); Moore *et al.*, *supra*, § 131.40[3][e], at 131-155 ("[F]ailure of the plaintiff to *receive* [] notice in the prior action is not, by itself, sufficient to defeat the preclusive effect of a class action judgment.").

There is no reason to think that Due Process requires a more exacting adequacy of representation standard.[17] Just as

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[17] *See* Benjamin Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 392 (1967) ("[N]otice . . . joins with other features of the new rule in helping to justify the ultimate extension of the judgment in (b)(3) cases to all members of the class, except those who requested exclusion from the action: recall *Hansberry v. Lee* with its suggestion that the *validity of class adjudication is related to the fairness of the procedural forms through which the adjudication is attained.*") (emphasis added).

delivery of notice to individual class members cannot be guaranteed, *see Peters*, 966 F.2d at 1486 ("[T]he due process clause does not amount to a guarantee of notice to a class member"; "[d]espite technological advances, the mail is not one hundred percent reliable"), so too "adequacy of representation" *in fact* cannot be guaranteed with complete certainty. This is especially so given that the adequacy of representation inquiry is highly fact-dependent and discretionary in nature, and is thus susceptible to a range of differing, yet reasonable, conclusions. *See infra* at 29. The certifying court must, of course, ensure that class counsel diligently represents the class, and that the representative's interests do not substantially conflict with those of other class members. But merely because a collateral court concludes that it would have reached a somewhat different discretionary judgment – say, because the adequacy issue appears differently with the full benefit of 20/20 hindsight, or because an absent class member first raises particular adequacy objections before the collateral court despite notice and a full opportunity to raise such objections before the certifying court – does not mean that Due Process has been violated. Due Process is satisfied, and classwide preclusion justified, as long as the certifying court "fairly insures the protection of the interests of absent parties who are to be bound by it." *Hansberry*, 311 U.S. at 42; Allen, *supra*, at 1159-60 (assuming fair procedures in the rendering jurisdiction, "no aspect of fundamental fairness to a class member who elects not to opt-out after notice compels" a right to bring a collateral attack on adequacy

grounds).[18]

Considered in this light, a contrary interpretation of the Due Process Clause with respect to adequacy of representation would be quite anomalous. The ultimate value that Due Process seeks to protect in these circumstances is an individual's right to a "day in court." Moore *et al.*, *supra*, § 131.40[1], at 131-130.1. But that value, as the notice example reveals, must occasionally give way to society's greater interest in conclusive resolution of complex litigation through the class action device. Thus, where the class has been adequately notified; where members of the class (and the defendant opposing class certification) have every opportunity and incentive to wage objections to the adequacy of the class representative; where the certifying court expressly rules on the representative's adequacy; and where that ruling is subject to review on direct appeal; the question naturally arises: What possible additional interest is served by protecting the individual's right to relitigate the very same, highly fact-dependent, question on collateral review? And to the

[18] *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367 (1996), also supports this procedural interpretation. Although the Court declined expressly to decide respondents' claim that the class was inadequately represented, *see id.* at 378 n.5, other portions of the Court's opinion indicate tacit approval of a procedural-type review of adequacy of representation issues on collateral attack, *see id.* at 378-79 (concluding that state court settlement would be entitled to preclusive effect by reviewing the Delaware courts' discussion of the necessary predicates for preclusion (including notice, opportunity to be heard, and adequacy of representation), rather than making an independent, collateral determination on the merits); *see also id.* at 379 n.5 (noting that class members had advanced an adequacy of representation argument "*in spite of* the [state court's] express ruling, following argument on the issue, that the class representatives fairly and adequately protected the interests of the class") (emphasis added); *Epstein*, 179 F.3d at 649 (*Matsushita* indicates that "broad collateral review of the adequacy of representation (or of the other due process requirements for binding absent class members) is not available").

extent such an interest exists, can the Due Process Clause sensibly be read to demand its vindication, even at the cost of destroying the utility of the class action device?

In sum, this Court's precedents do not require adequate representation *in fact* as a prerequisite to classwide preclusion. As a general rule, conscientious application of Rule 23 will satisfy Due Process because, as demonstrated above, Rule 23 ensures that the certifying court take adequate measures to protect the absent class members' interests. *See Epstein*, 179 F.3d at 649-50 ("properly entertained" class action justifying classwide preclusion is "one in which a certifying court employs the appropriate procedures to determine that the due process requirements embodied in Rule 23 have been met"); Allen, *supra*, at 1160 ("A class member in a Rule 23(b)(3) class action is afforded due process of law by the conscientious application by the court of the requirements of Rule 23 . . . ."). Due Process simply cannot bear the weight that the broad collateral attack rule would place upon it.

C. A Broad Collateral Attack Rule Is Not Necessary To Provide Adequate Protection for Absent Class Members' Interests.

As argued above, neither general principles of *res judicata* nor the Due Process Clause mandate the broad collateral attack rule adopted below. Thus, proponents of that rule ultimately must rest on the notion that collateral redetermination of the certifying court's adequacy determination is somehow necessary to ensure adequate protection of the absent class members' interests. For example, respondents have argued that broad collateral review is necessary as a "check on attempts by overreaching settlements to bind absent claimants." Opp. at 16; *see Epstein*, 126 F.3d at 1242-43 (pointing to potential abusive settlements as an argument in favor of broad collateral attacks), *rev'd* 179 F.3d 641 (9th Cir. 1999). In other words, the rule in favor of broad collateral attacks should be adopted, its proponents urge, because

that rule best serves the values underlying the adequacy of representation requirement.

It is, of course, entirely proper for this Court to evaluate the promised benefits of broad collateral review in deciding whether to adopt it. The doctrine of *res judicata*, after all, is premised on a host of pragmatic considerations that balance an individual's interest in pursuing a lawsuit against the important countervailing interests of finality, conservation of judicial resources, and minimizing inconsistent decisions. *See* Note, *supra*, at 601 n.68 ("The concept of *res judicata*, like that of the class action, reflects a balance among the principles of judicial finality, conservation of judicial resources, and the right of each litigant to a day in court."); *Brecht*, 507 U.S. at 633 (in defining scope of habeas corpus, Court "look[s] first to the considerations underlying . . . habeas jurisprudence, and then determine[s] whether the proposed rule would advance or inhibit these considerations by weighing the marginal costs and benefits of its application on collateral review").

But a complete evaluation of these competing policies requires serious consideration of the substantial *costs* imposed by permitting broad collateral review. And as this Court has concluded on numerous occasions in the habeas corpus context, those costs often outweigh the promised benefits of a broad right to relitigate previously decided questions.[19] Given the direct conflict between a broad col-

[19] *See Brecht*, 507 U.S. at 638-39 (applying cost/benefit analysis to conclude that "harmless error" standard applicable on direct review would not apply on habeas, and that stricter standard requiring actual prejudice would apply); *Teague v. Lane*, 489 U.S. 288, 309 (1989) (rejecting retroactive application of new constitutional rules on habeas review because costs outweigh benefits); *Stone v. Powell*, 428 U.S. 465, 492-95 (1976) (concluding that costs of applying Fourth Amendment exclusionary rule on habeas outweighed its benefits, and that collateral attack challenging introduction of unlawfully obtained evidence was limited to whether state provided an "opportunity for full and fair litigation of a Fourth Amendment claim").

lateral attack right and the interests of finality and classwide preclusion at the heart of the modern class action device, *see supra* at I, it is hard to imagine how the cost/benefit calculation could ever favor adoption of the Second Circuit's rule. *See Moitie*, 452 U.S. at 401 (policies favoring preclusion are "even more compelling in view of today's crowded dockets"); *Martin*, 490 U.S. at 783 n.21 (Stevens, J., dissenting) ("[A] broad allowance of collateral review would destroy the integrity of litigated judgments, would lead to an abundance of vexatious litigation, and would subvert the interest in comity between courts."). In any event, no such showing has been made by the rule's proponents who, as noted, simply ignore its substantial costs.

Even putting aside the costs of such an approach, its supposed benefits are entirely speculative, if not wholly illusory. The crux of the problem is that proponents of the broad collateral attack rule have yet to explain *why* a second adequacy of representation determination is any more reliable or trustworthy than the initial court's adequacy determination, or why such duplicative review would in any way help curb supposed class action abuses. *See* Kahan & Silberman II, *supra*, at 776-86 (arguing that broad collateral attack is not an effective or appropriate method for curbing "plaintiff shopping" or "forum shopping," and that there is no "reason to believe that the determination of (a lack of) adequate representation in a collateral attack is more likely to be correct than the determination of (the presence of) adequate representation in the initial action.").

Indeed, by insisting on a second adequacy determination in order to afford preclusive effect to a class determination, the rule inappropriately assumes that the initial determination by the certifying court is somehow deficient. Commentators supporting a broad collateral attack right have gone so far as

to suggest that the certifying court is not capable of rendering an objective and unbiased adequacy of representation ruling because of the court's own interests in clearing its docket. *See* Woolley, *supra*, at 432-34 (discussing alleged "structural bias" of certifying courts in favor of finding adequacy). Suffice it to say, such a presumption of institutional bias or incompetence is plainly illegitimate.[20] Nor can such a view be reconciled with this Court's description of the certifying court as the protector of absent class members' interests. *See Shutts*, 472 U.S at 809 (noting that, from plaintiffs' perspective a "class action resembles a 'quasi-administrative proceeding, conducted by the judge,'" and that an absent class member is not required to "fend for himself" because the "court and named plaintiffs protect his interests") (citation omitted); *see also id.* at 810 (referring to "continuing solicitude for [absent class members'] rights").[21]

Finally, the supposition that multiple adequacy determinations will improve the reliability of those determinations is simply implausible. A broad collateral attack rule gives class members a powerful incentive to remain silent during the class action proceedings, and to complain about perceived inadequacies of representation only if the relief obtained by the rest of the class later seems inadequate. Such an incentive would deprive the certifying court of information that it needs to reach a fair and complete adequacy de-

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[20] *See Mickens v. Taylor*, 535 U.S. 162, ___, 122 S.Ct. 1237, 1244 (2002) ("[W]e do not presume that judges are as careless or as partial as those police officers who need the incentive of the exclusionary rule.").

[21] *Epstein*, 179 F.3d at 648 (*Shutts* implies unavailability of broad collateral attack rule by "emphasizing that the certifying court is charged with protecting the interests of the absent class members"); Kahan & Silberman I, *supra*, at 268 (rejecting broad collateral attack rule "because federal class action procedures in effect appoint the court as the guardian of the interests of absent class members to ensure adequate representation and the fairness of any settlement"); Note, *supra*, at 602 (same).

termination in the first place. Then again, by relying on the collateral court to compensate for the initial court's supposed deficiencies, the broad collateral rule entrusts a court with no first-hand experience in managing the class proceedings to make a highly fact-intensive, discretionary judgment about the quality of representation in a proceeding that may have taken place (as in this case) many years ago.[22] Thus, the broad collateral attack rule promises *numerous* adequacy of representation findings by multiple courts – *none of which* will be as reliable as the determination that the certifying court could make *if* collateral attacks were limited to a review of the procedures employed by the certifying court. In the words of the leading academic critics of the collateral attack rule, the far better approach is to "Do it once, but do it right." Kahan & Silberman III, *supra*, at 1199.

For all of these reasons, a broad collateral attack rule offers little, if any, tangible benefits to class members or to the integrity of class proceedings. Instead, it promises pervasive uncertainty, and dramatically increased costs, in the class action arena. Because such a rule is not compelled by any legal principle, and because no sound policy supports its adoption, this Court should reject it once and for all.

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[22] Recognizing the discretionary nature of this issue, the courts of appeal apply an abuse of discretion standard when reviewing lower court adequacy determinations. *See* 7A Wright *et al.*, *supra*, § 1765, at 271, 273. The notion (implicitly adopted by the Second Circuit below) that the initial court's adequacy determination would receive *less deference* on collateral review than it would on direct review is, to say the least, extraordinary. *See* Note, *supra*, at 603. In addition, the fact-intensive nature of the adequacy determination seriously undermines the argument that reconsideration by a collateral court increases reliability. *See* Kahan & Silberman II, *supra*, at 789 n.104 (uncertainty "about when the standard of 'adequate representation' has been met underscores the need to limit the availability of collateral attack").

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below.

Respectfully submitted,

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APPENDIX A

CORPORATE MEMBERS/ PRODUCT LIABILITY ADVISORY COUNCIL, INC.

3M

Allegiance Healthcare Corporation

Altec Industries

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Ansell Healthcare, Inc.

Appleton Papers, Inc.

Aventis Pharmaceuticals, Inc.

BASF Corporation

Baxter International, Inc.

Bayer Corporation

Beretta U.S.A Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Bombardier Recreational Products

BP Amoco Corporation

Bridgestone/Firestone, Inc.

Briggs & Stratton Corporation

Bristol-Myers Squibb Company

Brown and Williamson Tobacco

Brown-Forman Corporation

Brunswick Corporation

Caterpillar Inc.

Centerpulse USA Inc.

Chevron Corporation

Compaq

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

DaimlerChrysler Corporation

Dana Corporation

Deere & Company

Delphi Corporation

Dorel Juvenile Group, Inc.

E & J Gallo Winery

E. I. DuPont de Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

ExxonMobil Corporation

FMC Corporation

Ford Motor Company

General Electric Company

General Motors Corporation

Georgia-Pacific Corporation

GlaxoSmithKline

GLOCK, Inc.

Great Dane Limited Partnership

Guidant Corporation

Harley-Davidson Motor Company

Harsco Corporation, Gas & Fluid Control Group

Honda North America, Inc.

Hyundai Motor America

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc.

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Kolcraft Enterprises, Inc.

Kraft Foods North America, Inc.

Mazda (North America), Inc.

McNeilus Truck and Manufacturing, Inc.

Medtronic, Inc.

Mercedes-Benz of North America, Inc.

Michelin North America, Inc.

Miller Brewing Company

Mitsubishi Motor Sales of America, Inc.

Niro Inc.

Nissan North America, Inc.

Novartis Pharmaceuticals Corporation

Otis Elevator Company

PACCAR Inc

Panasonic

Pentair, Inc.

Pfizer Inc.

Pharmacia Corporation

Philip Morris Companies Inc.

Polaris Industries, Inc.

Porsche Cars North America, Inc.

Purdue Pharma L.P.

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RJ Reynolds Tobacco Company

Schindler Elevator Corporation

SCM Group USA Inc.

Sears, Roebuck and Co.

Shell Oil Company

Siemens Corporation

Smith & Nephew, Inc.

Snap-on Incorporated

Sofamor Danek, Medtronic Inc.

Solutia Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Sunbeam Corporation

Synthes (U.S.A.)

Textron, Inc.

The Boeing Company

The Dow Chemical Company

The Goodyear Tire & Rubber Company

The Heil Company

The Lincoln Electric Company

The Procter & Gamble Company

The Raymond Corporation

The Sherwin-Williams Company

The Toro Company

Thomas Built Buses, Inc.

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Inc.

UST (U.S. Tobacco)

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Water Bonnet Manufacturing, Inc.

Whirlpool Corporation

Wilbur-Ellis Company

Wyeth

Yamaha Motor Corporation, U.S.A.

Zimmer, Inc.